

Magyar Jeti Zrt v. Hungary: the Court provides legal certainty for journalists using hyperlinks

On 4 December 2018 the European Court of Human Rights ('the Court') found a violation of Article 10 of the European Convention on Human Rights in [Magyar Jeti Zrt v. Hungary](#). The case concerns the imposition of objective liability for posting a hyperlink leading to defamatory content, with the Court ultimately deciding that using hyperlinks does not simply equate to acts of dissemination. Instead, it requires a case-by-case assessment on the basis of five flexible criteria, resulting in a highly relevant and well-rounded judgment.

Background

The applicant in the present case is Magyar Jeti Zrt, a company that operates the Hungarian news portal '444.hu'. It had published an article about an incident at a Roma school, whereby a group of drunk passers-by had thrown beer bottles and shouted insults and threats to the children (§7). Afterward, local Roma leader Mr. Gy gave an interview in which he accused the political party Jobbik of the incident. The 444.hu article on the events did not refer to Mr. Gy's accusations in any way, but read: "A phone conversation with [local Roma leader] Mr. Gy and a parent has already been **uploaded to Youtube**" (emphasis added). The words "uploaded to YouTube" were green-coloured (compared to the black text of the rest) and had been activated to be a hyperlink (§9).

According to [dictionary Merriam-Webster](#), a hyperlink is "[a]n electronic link providing direct access from one distinctively marked place in a hypertext or hypermedia document to another in the same or a different document". If a reader clicked on the green words, their browser was routed to the interview in question, where Mr. Gy made his accusation. The political party found fault with this statement and started legal proceedings. Not only Mr. Gy, but also media websites including Magyar Jeti Zrt were brought before the courts on the ground that they had disseminated a defamatory statement.

National proceedings

The first domestic court confronted with the case was the Hungarian High Court. It sided with Jobbik's claim by finding that the party's right to reputation was infringed due to Mr. Gy's statements, and that the infringement was imputable to the applicant company because of the mere "*publication and dissemination of a falsehood that pertains to another person*" (§14). The applicant's arguments – the company claimed that it had not repeated the interview's statements, nor disseminated any falsehoods – were not taken into consideration, until the Debrecan Court of Appeal treated the case. Although it upheld the High Court's judgment, it addressed the applicant's arguments by stating that

making a false statement available through a link, even without identifying with it, qualifies as the dissemination of facts. Dissemination (or circulation) is the sharing of a piece of news as a content of thought and making it available for others. Contrary to [the applicant's] viewpoint expressed in its appeal, the infringement of law by dissemination occurs even if the disseminator does not identify with the statement, and even if their trust in the veracity of the statement is ungrounded (§16).

The applicant was thus held *objectively liable for disseminating defamatory statements*, with which the Hungarian Constitutional Court and the Supreme Court (the Kúria) agreed. The latter reasoned that

dissemination is carried out by sharing or making public any information, as a result of which anyone can have access to the given content. [...] Internet link to one's own publication serves an appendix; it becomes accessible and readable with a single click. The Civil Code established objective responsibility for the dissemination, irrespective of the good or bad faith of the disseminator. In the Kúria's view,

requiring media outlets not to make injurious statements accessible does not constitute a restriction of freedom of the press or freedom of expression [...] (§19).

Judgment of the EctHR

The Court commences its analysis by investigating whether hyperlinks can be equated to 'acts of dissemination'. It concludes that four crucial characteristics of hyperlinks result in a differentiation:

1. **Hyperlinks have a navigational function.** They "*allow internet-users to navigate to and from material in a network characterised by the availability of an immense amount of information*" (§73).
2. **Hyperlinks are referencing tools.** They "*do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website*" (§74).
3. **Hyperlink providers do not control the content.** An author who posts a hyperlink "*does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link*" (§75).
4. **Finally, hyperlinks do not create new content.** The Courts points out that "*the content behind the hyperlink has already been made available by the initial publisher [...] providing unrestricted access to the public*" (§75).

Due to the aforementioned reasons, using hyperlinks does not automatically amount to the dissemination of defamatory information. Liability must therefore also be assessed differently, with the Court requiring individual assessments and positing five "relevant aspects" that should be taken into account to conclude whether liability should be imposed for the use of a hyperlink (§77):

1. Did the journalist **endorse** the impugned content?
2. Did the journalist **repeat** the impugned content (**without endorsing it**)?
3. Did the journalist **merely put** a hyperlink to the impugned content (**without endorsing or repeating it**)?
4. Did the journalist **know or could reasonably have known** that the impugned content was **defamatory or otherwise unlawful**?
5. Did the journalist **act in good faith, respect the ethics of journalism** and perform the **due diligence** expected in responsible journalism?

Importantly, the Court clarifies that the assessment of (reasonable) knowledge under criteria 4 "*must be determined in the light of the situation as it presented itself to the author at the material time, rather than with the benefit of hindsight on the basis of the findings of the domestic courts' judgments*" (§81), providing a strong default protection for journalists. However, the Court also builds in a failsafe mechanism by recognising that liability is possible where a journalist "*does not act in good faith in accordance with the ethics of journalism and with the diligence expected in responsible journalism dealing with a matter of public interest,*" even if he or she merely repeats a statement (§80).

By subjecting the case to the aforementioned five criteria, as well as taking into account the chilling effect that the imposition of objective liability could entail (§83) and the fact that the domestic courts never considered the applicant's rights under article 10, nor conducted a balancing exercise between article 10 and article 8 (§83), the Court unanimously concludes that article 10 has been violated.

Separate opinion

In his concurring opinion, judge Pinto De Albuquerque does not criticise the Court's judgment, but rather provides insight into its reasoning. His opinion emphasises the inspiration taken from the third-party intervention submission by advocacy group Article 19. The group emphasised court cases and other sources positing a permissive view of hyperlinks, such as the US case [Philadelphia](#)

[Newspapers](#) and the landmark Supreme Court of Canada case [Crookes v. Newton](#). In fact, the judgment goes quite far in following Article 19's submissions: the four differences between hyperlinks and acts of dissemination are based on paragraphs 8 through 20 of Article 19's submission; the objective standards in §77 of the judgment reflect paragraphs 25 through 28 of the submission; and the exception to allow for a hyperlink publisher's liability is based on paragraphs 21 and 22. This far-reaching adoption of the organisation's viewpoints might be a result of the backlash that the Court faced after its judgment in the Mouvement Raëlien Suisse case (which also concerned hyperlinks; see *infra*).

Most valuably, he uncovers the reasoning behind the five criteria to assess liability, stating that the Court set out to exhaustively describe "*the objective and subjective criteria for assessing all possible scenarios involving the use of hyperlinks by journalists*" (§9). To achieve this, three types of **conduct** are taken into account:

1. hyperlinking with endorsement of the referred-to content;
2. hyperlinks with repetition of the content to which they lead;
3. mere hyperlinking.

They are combined with three types of **subjective standard**:

1. good faith;
2. knowledge that the referenced content is defamatory or otherwise unlawful;
3. constructive knowledge that it could be so (§10-§11).

He also emphasises that journalists' hyperlink obligations concerning good faith, professional ethics and due diligence are "*obligations of means and not of result*" (§14).

Comment

The Magyar Jeti Zrt judgment presents an interesting legal situation: that of vicarious or imputed liability for hyperlinking to online content. The concept of vicarious liability exists in almost every legal system and pertains to the situation whereby a 'superior' (usually an employer) is held liable for certain actions by someone under his or her 'supervision' (usually an employee). The present case, however, asks whether it is fair to find someone objectively liable for referring to online content over which they have no control and that is only afterwards declared as 'unlawful'. The Court's answer is no: such an imposition of objective liability could cause a chilling effect (§83), while installing a "*general requirement for journalists systematically and formally to distance themselves from the content of a quotation [...] is not reconcilable with the press's role of providing information*" (§80).

Missing in the Court's reasoning, however, is an elaboration on the degree of 'control' (or supervision) necessary to impose vicarious liability, resulting in some legal uncertainty. The only mention is found in criteria 3, where the Court states that providers of hyperlinks do not have control over the content and subsequent changes of the linked content, "*a natural exception being if the hyperlink points to contents controlled by the same person*" (§75). Judge Pinto De Albuquerque does not elaborate on this brief statement in his concurring opinion either (§6). This comes across as a missed opportunity, since the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić in the 2012 case Mouvement Raëlien Suisse (see *infra* for a more extensive discussion) *does* elaborate on the scope of control needed. The judges devote almost an entire page to this element and ultimately suggest the high threshold of a 'clear, convincingly established demonstration of control' to allow vicarious liability where online content is concerned – a stark contrast to the Court's single phrase in Magyar Jeti Zrt. By further exploring the key criterion of control that is necessary to trigger vicarious liability, the Court could have made its judgment even more theoretically sound *and* it would have allowed to anticipate a future case concerning composite publications (for example, a series of articles on the same topic or follow-up articles, both of which are prevalent in journalism; see also the Australian case of [Cripps v Vakras](#)).

In spite of this criticism, the judgment is undoubtedly a massive improvement compared to before. It finally offers legal certainty and guidance for journalists, who until now had no criteria to base themselves on when deciding whether or not to hyperlink to possibly controversial content. Moreover, it grants them a strong default level of protection, enabling them to carry out their job without fearing baseless convictions of defamation, while still allowing liability in those exceptional cases where journalists truly act in bad faith. Additionally, from the perspective of the Court's case law, Magyar Jeti Zrt washes away the bitter aftertaste from the Court's previous judgment concerning hyperlinks in the contentious [Mouvement Raëlien Suisse v. Switzerland case](#). There, the Court allowed the Swiss authorities to block a company from putting up posters that contained a link to its website, since this website in turn linked to a site concerning cloning, which was considered content contrary to the Swiss public order. This imposition of vicarious liability was decided in the Grand Chamber with 9 votes to 8 and [received criticism for being outdated](#) since it did not consider modern forms of advertising. In contrast, the Court's decision here shows an understanding of what can reasonably be expected from authors who refer to other online content and of the important role that hyperlinks play on the internet; it should not go lost on you that this very blog post and website also relies on hyperlinks to refer to other content. In that way, the Magyar Jeti Zrt judgment truly forms the missing link concerning the protection of speech on the internet.

Carl Vander Maelen is a teaching assistant and doctoral researcher in the [research group Law & Technology at Ghent University](#). He is the recipient of the Young Scholar Award – 1st Price at the 2018 Amsterdam Privacy Conference and is working on a PhD regarding the influence of GDPR-based codes of conduct on corporate behaviour.